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(31)

IN THE

Supreme Court of the United States

October Term, 1944.

No. 1216

42ND ST. FOTO SHOP, INC., FOTOSHOP, INCORPORATED and SAM MARCUS, d/b/a MARCUS PHOTO SERVICE and as FOTOSHOP,

Petitioners,

vs.

NEW YORK STATE LABOR RELATIONS BOARD.

Petition for Writ of Certiorari to the Supreme Court of the State of New York.

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SUBJECT INDEX.

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statutory and Constitutional Provisions Involved	4
Statement	5
Specification of Errors to Be Urged	30
Reasons for Granting the Writ	31
Conclusion	34
Appendix	35

TABLE OF CASES CITED.

Boeing Airplane Co., Wichita Division v. National Labor Relations Board, 140 Fed. 2d 423 6

Budd Mfg. Co. v. National Labor Relations Board, 142 Fed. 2d 922 6

Davega-City Radio Inc. v. State Labor Relations Board, 281 N. Y. 13, 22 ..... 31, 32

Elastic Stop Nut Corp. v. National Labor Relations Board, 142 Fed. 2d 371, cert. den. 322 U. S. (89 Law Ed. Adv. Op. No. 1, p. 39) 6

National Labor Relations Board v. American Tube Bending Co., 134 Fed. 2d 993, cert. den., 320 U. S. 768 ..... 5, 6, 32

National Labor Relations Board v. Citizen-News Co., 134 Fed. 2d 962, and 970 6

PAGE

National Labor Relations Board v. Laister-Kaufman Aviation Co., 144 Fed. 2d 9 6
National Labor Relations Board v. Pick Mfg. Co., 135 Fed. 2d 329 6
National Labor Relations Board v. Sunbeam Electric Mfg. Co., 133 Fed. 2d 856 6
National Labor Relations Board v. Trojan Powder Co., 135 Fed. 2d 337, cert. den. 320 U. S. 768 (rehearing denied, idem 813) 6
National Labor Relations Board v. Virginia Electric and Power Co., 314 U. S. 469 ..... 5, 6
New York State Labor Relations Board v. Montgomery Ward & Co. Inc., 179 Misc. 298 5
New York State Labor Relations Board v. Timen, 264 App. Div. 120, at p. 122 ..... 31, 32
Stork Restaurant Inc. v. Boland et al., 282 N. Y. 256 5, 29

CONSTITUTIONAL PROVISIONS.

First Amendment to the Constitution 36
Fourteenth Amendment to the Constitution 36

STATUTE.

New York State Labor Relations Act, Labor Law of the State of New York, Article 20, being Laws of 1937, Chap. 443, Sec. 1 35

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Petitioners,

vs.

NEW YORK STATE LABOR RELATIONS BOARD.

Petition for Writ of Certiorari to the Supreme Court of the State of New York.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, a resident of the State of New York, and two corporations organized under and existing by virtue of the laws of the State of New York, respectfully pray that a writ of certiorari issue to review the final order entered on December 8th, 1944 (R. 1403-4), upon the Remittitur of the Court of Appeals, the highest court of the State of New York (R. 1402), denying leave to appeal to the Court of Appeals, from an order of the Appellate Division of the Supreme Court of the State

of New York, First Judicial Department, entered on June 9th, 1944 (R. 1369-70), affirming an order of the Supreme Court, New York County, entered on June 8th, 1943 (R. 4), denying petitioners' application to vacate and set aside the Decision and Order of the New York State Labor Relations Board dated December 31st, 1942 (R. 1329-59).

Opinions Below.

No opinion was rendered by any of the courts of the State of New York. The Special Term of the Supreme Court, New York County, wrote a short memorandum (R. 4), not reported.

The affirmance by the Appellate Division, First Judicial Department, was without opinion (R. 1394) and is reported in 268 App. Div. 759 (case 4). The order of the Appellate Division, First Judicial Department, denying leave to appeal to the Court of Appeals, was without opinion (R. 1396) and is reported in 268 App. Div. 849 (case 6).

The order of the Court of Appeals of the State of New York, denying leave to appeal to it, was also without opinion (R. 1401) and is reported in 293 N. Y. (weekly advance sheets No. 297, Jan. 6, 1945, p. i).

Jurisdiction.

The final order of the Court of Appeals of the State of New York was entered on November 30th, 1944 (R. 1401) and the final order of the Supreme Court of New York, County of New York, making the said order of the Court of Appeals its order, was entered on December 8th, 1944 (R. 1403-4). The time for filing a petition for a writ of certiorari to this Court was extended to April 16th, 1945 by order dated February 19th, 1945 (R. 1405), and was further extended to April 28th, 1945, by order dated April 13th, 1945.

The jurisdiction of this Court is invoked under Section 237(a) of the Judicial Code (28 U. S. C. §344).

Questions Presented.

1. Whether the construction by the courts of the State of New York of the provisions of the Act (*infra*, (p. 35), which, in effect, gives to a union free and untrammeled license to attack and vilify an employer and at the same time forbids an employer from replying to, or commenting upon, such attacks, does not deprive such employer of its right of free speech, as guaranteed by the First Amendment, and, further, does not deny to such employer the equal protection of the laws, as guaranteed by the Fourteenth Amendment.

2. Whether an order adjudging that an employer has violated the provisions of the Act (*infra*, p. 35), based upon comment by the employer referring generally to unions, at a time concededly well prior to any activity whatsoever by the complaining union and which comment does not refer to the complaining union, does not deprive such employer of its right of free speech guaranteed to it by the First Amendment.

3. Whether an order adjudging that an employer has violated the provisions of the Act (*infra*, p. 35), based upon the comment of the employer concerning a union:

that at no time had ever asserted a claim of representation of the employer's employees;

that at no time had ever requested nor demanded recognition as the collective bargaining agent of the employees of the employer, nor sought such bargaining;

that had never filed an application with the New York State Labor Relations Board, nor any other agency, for

certification as collective bargaining agent for any of the employees of the employer, nor had filed any charge of unfair labor practices against the employer;

and which comment was made by the employer at a time when no proceedings of any kind were pending before the New York State Labor Relations Board, nor any other agency, concerning the employer, and at a time when no election by employees to designate a collective bargaining agent had been ordered by the New York State Labor Relations Board, nor any other agency, nor even petitioned for by such union, does not violate the employer's right of free speech as guaranteed by the First Amendment.

4. Whether an order adjudging that an employer has violated the provisions of the Act (*infra*, p. 35), based upon a finding that comment by an employer to its employees coerced the employees, when the record contains no evidence showing coercion, is supported by evidence, and does not deprive the employer of its right of free speech guaranteed by the First Amendment, and of its property without due process of law and of the equal protection of the laws, as guaranteed by the Fourteenth Amendment.

5. Whether an employer may not, in the light of the provisions of the Act (*infra*, p. 35), comment to its employees concerning the activities of a union seeking to organize its employees, and whether such comment is not privileged by the provisions of the First Amendment.

Constitutional and Statutory Provisions Involved.

The relevant portions of the Constitution are set forth in the Appendix, *infra*, page 36.

The relevant portions of the Act are set forth in the Appendix, *infra*, page 36.

Statement.

The ground or grounds upon which the courts below upheld the order of the New York State Labor Relations Board (R. 1329-59) (hereinafter, for facility, referred to as the Board) are unknown, as no opinions were written. The memorandum decision of the Special Term of the Supreme Court cited two cases, *Stork Restaurant Inc.* v. *Boland, et al.*, 282 N. Y. 256 and *N. Y. S. L. R. B.* v. *Montgomery Ward & Co., Inc.*, 179 Misc. 298 (R. 4) that stand generally for the proposition that the Board's orders will be sustained if there be substantial evidence in the record. "The findings of the board as to the facts, if supported by evidence, shall be conclusive" (New York State Labor Relations Act, Sec. 707(2). And see *Stork Restaurant Inc.* v. *Boland, supra*, at pages 266-7. This, it may fairly be assumed, constitutes the basis for the several decisions of the State courts.

The record in this proceeding consists of 1,406 pages, bound in two volumes and a supplement. Much of that record is not germane to the constitutional questions raised by this petition. The summary here presented will be devoted only to such portions of the evidence and record that are pertinent to those issues.

At the outset, let it be clear that petitioners raised the constitutional question below. In their brief before the Appellate Division, First Judicial Department, petitioners asserted that the Board's final Decision and Order "• • • is not supported by substantial evidence and invades appellants' (petitioners') right of free speech". In their reply brief before the same court, one of petitioners' points was "Appellants (petitioners) reiterate that respondent's order violates the First Amendment to the Constitution".

In support of their contention, petitioners cited *National Labor Relations Board* v. *American Tube Bending Company*, 134 Fed. 2d 993, cert. den., 320 U. S. 768, *National Labor Relations Board* v. *Virginia Electric and*

Power Company, 314 U. S. 469, *Boeing Airplane Co., Wichita Division* v. *National Labor Relations Board*, 140 Fed. 2d 423, *Budd Manufacturing Co.* v. *National Labor Relations Board*, 142 Fed. 2d 922.

The Board, before the Appellate Division, contested petitioners' constitutional point, arguing vigorously that petitioners' right of free speech had not been invaded. It cited, in addition to the *Virginia Electric and Power Co.* and *American Tube Bending* cases, *supra*, *National Labor Relations Board* v. *Trojan Powder Co.*, 135 Fed. 2d 337, cert. den. 320 U. S. 768 (rehearing denied, idem 813), *National Labor Relations Board* v. *Sunbeam Electric Manufacturing Co.*, 133 Fed. 2d 856, *National Labor Relations Board* v. *Pick Manufacturing Co.*, 135 Fed. 2d 329, and *Elastic Stop Nut Corp.* v. *National Labor Relations Board*, 142 Fed. 2d 371, cert. den. 322 U. S. (89 Law Ed. Adv. Op. No. 1, p. 39)

The application made by petitioners to the Appellate Division, for leave to appeal to the Court of Appeals, was based almost entirely upon this same contention (R. 1374-5).

The Board, in opposing this application, took square issue with this contention (R. 1378-9).

The application by petitioners to the Court of Appeals, for leave to appeal, similarly was based largely upon this same ground (R. 1383). The larger portion of petitioners' brief in support of this application was concerned with the issue of free speech, citing, in addition to the authorites already enumerated *supra*, *National Labor Relations Board* v. *Citizen-News Co.*, 134 Fed. 2d 962, and 970.

The Board, in its argument, again predicated its opposition on the ground that no issue of free speech was involved. Its brief there cited, in addition to the authorities already mentioned as having been cited by it, *National Labor Relations Board* v. *Laister-Kaufman Aviation Co.*, 144 Fed. 2d 9.

Nevertheless, despite the fact that no court of the State of New York had ever passed upon that constitutional issue, in the light of the provisions of the Act and the obligations laid upon an employer by those provisions, no opinion was forthcoming.

The proceeding before the Board was initiated by its complaint (R. 26-32), which in effect charged petitioners with having engaged in unfair labor practices within the meaning of the Act (Sec. 704, subds. 4, 5 and 10) (R. 30-1).

This complaint contained two specifications. One was that three certain employees, to-wit, Jay Irving, Edwin Cohen and Philip Klass, had been discharged because of membership and activity in the union involved (R. 28-9).

The second specification charged petitioners with, "since January 1, 1942", restraining and coercing their employees in their rights of self-organization, by directing and warning them to refrain from joining the union, by disparaging and vilifying the union, by threatening to go out of business or curtail personnel if compelled to deal with the union, and by questioning employees as to their membership and activity in the union (R. 29-30).

This complaint named the three entities as they appear in the instant proceeding (R. 26). The separate verified answers interposed by each of the petitioners (R. 38-43) put in issue all of the material allegations of the Board's complaint. The answer of petitioner Marcus contained also an affirmative defense that some of his employees had been, and were at that time, union members (R. 1063-4, 1222, 1331).

The union's charge, upon which the Board's complaint was based, rested completely upon the alleged discriminatory discharges of the three named employees (R. 35). As the matter was tried by and before the Board, it was concerned almost entirely with these alleged discriminatory discharges (R. 1222).

The Intermediate Report of the Trial Examiner sustained the complaint in its entirety (R. 1216-70). The Trial Examiner specifically found that these three employees had been discharged as "a direct result of their membership in the union and their activities on its behalf" (R. 1264).

He found further that petitioners had "subsequent to January 1, 1942", violated the provisions of subdivisions 4, 5 and 10 of Section 704 of the Act and sustained, with but one exception, the allegations as stated in the second specification hereinabove (*supra*, p. 7) (R. 1265-7).

This exception has to do with the allegation in the complaint ([d] R. 30) that petitioners had questioned their employees concerning union membership and activity. Concerning this allegation the Examiner made no finding whatsoever (R. 1266-7). He did find that the three entities named in the Board's complaint "at all times acted on behalf of and in the interest of one another and to all practical purposes were one and the same" (R. 1262).

Petitioners duly filed Exceptions to this Intermediate Report (R. 1277-81). Thereafter oral argument was had before the Board (R. 1287-1328), following which the Board issued what it terms its Final Decision and Order (R. 1329-59).

The Board's Order specifically reversed the Trial Examiner as to Klass (R. 1345-8, 1353, 1355) and dismissed the complaint insofar as it related to him (R. 1358). The Examiner's Findings as to Irving and Cohen were sustained (R. 1352-4).

The Board made no specific findings in support of the allegations of interference, restraint and coercion, as alleged in the complaint (R. 30), but simply stated, generally, that petitioners "by others acts, have interfered with, restrained and coerced their employees in the exercise of the rights guaranteed by the Act" (R. 1353). The

Board's Conclusion of Law in respect of this phase was similarly general and without specification (R. 1354).

The Board found also that petitioners "act on behalf of and in the interest of one another and are part of a single enterprise headed by Sam Marcus" (R. 1352). It concluded as a matter of law, that all of the petitioners "are employers within the meaning of Section 701, subdivision 2, of the Act" (R. 1354).

Marcus is president of 42nd St. Foto Shop, Inc., which is located at 18 East 42nd Street (R. 736). Petitioner Fotoshop, Incorporated is merely a holding corporation, not engaged in any business, and without employees (R. 737, 739).

Petitioner Marcus conducts two other separate businesses, one known as Marcus Photo Service and the other as Fotoshop. The former, merely a photo finishing laboratory, unconnected with the retail business (R. 737), is located on the fifth floor of the building at 132 West 32nd Street, New York City (R. 421). The latter, a retail business, was located at 130 and 136 West 32nd Street, New York City (R. 42).

As already stated, the entire situation here was concerned only with petitioner 42nd St. Foto Shop, Inc. and its employees. The Board, nevertheless, issued its order against the other two petitioners, despite this factual hiatus, and in the face of timely motions to dismiss (R. 759-61, 1181-2).

There is literally no question of the lack of any evidence, to say naught of substantial evidence, connecting either Fotoshop, Incorporated or Sam Marcus, d/b/a Marcus Photo Service and as Fotoshop, with the alleged discriminatory discharges or with any deed in violation of the provisions of the Act. Fotoshop, Incorporated had no employees at all. Marcus Photo Service, an individual enterprise of Marcus, was in a wholly different field of business. His other individual enterprise, Fotoshop, was not the employer of either Cohen or Irving.

The only specific and concrete Finding of Fact made by the Board, upon which it predicated its conclusion that petitioners had violated the provisions of the Act, was that Irving and Cohen had been discharged "because of their membership and activities in the Union" (Finding No. 10, R. 1352). Upon this it based the further Finding that petitioners thereby "discouraged membership in a labor organization by discriminating in regard to hire and tenure of employment" (Finding No. 12, R. 1353), and, "required their employees, as a condition of employment, to refrain from forming or joining or assisting a labor organization of their own choosing" (Finding No. 13, R. 1353).

Despite the specifications of the complaint (R. 30-1), the Board further made only the general finding that petitioners "by other acts, have interfered with, restrained and coerced their employees in the exercise of the rights guaranteed by the Act" (Finding No. 16, R. 1353). The Conclusions of Law follow the same pattern (Conclusions Nos. 3, 4 and 5, R. 1354).

The two ultimate conclusions reached by the Board, to-wit, that two of the employees had been discharged because of union activity, and that petitioners had, generally, interfered with, restrained and coerced their employees in their right of self-organization, depend entirely, and literally that, upon testimony of alleged comment by the employer (R. 1336-8, 1348-50).

Upon this basis, the Board concluded that "Marcus and his wife, * * * were intensely hostile to unions" (R. 1336-7), and implemented this conclusion with its ultimate finding that the Act had been violated.

The two employees involved, Irving and Cohen, were employees only of petitioner 42nd St. Foto Shop, Inc. Cohen had started working for it on either July 21st or 23rd, 1941 (R. 155) and his employment terminated on January 23rd, 1942 (R. 28, 192, 1188-9, 1352). Irving com-

menced working for this petitioner in November, 1941 (R. 389) and his employment terminated on January 12th, 1942 (R. 28, 472, 1352).

The Board's complaint limited the alleged interference with, restraint and coercion of the employees, to "At all times since January 1, 1942 * * * " (R. 29, pa. 16). The Trial Examiner similarly limited his findings of interference, restraint and coercion to "Subsequent to January 1, 1942, * * * " (R. 1265-6, Finding No. 20).

The earliest date upon which it is even asserted the complaining union began its activities is January 7th, 1942 (R. 1339). Thus, the allegations in the complaint and the finding of the Trial Examiner are consistent with the beginning date of January 1st, 1942.

But the Board, even though it sustained its complaint, except as to the discharge of the employee Klass (R. 1355, 1358) and the charge of questioning of employees (R. 1354), deliberately refrained from including that significant date in its findings. It merely concluded, broadly, that the petitioners " * * * have interfered with, restrained and coerced their employees in the exercise of the rights guaranteed by the Act" (R. 1353, No. 16), and that petitioners " * * * have interfered with, restrained and coerced their employees in the exercise of the rights guaranteed them by Section 703 of the Act, and have engaged in, and are engaging in, unfair labor practices within the meaning of Section 704, subdivision 10, of the Act" (R. 1354, No. 5).

Analysis of the record points the reason for this extraordinary performance. Under its heading of "Background" (R. 1336 ff.), the Board condoned the glaring error of its Examiner in taking testimony as to alleged comment by petitioners, denominated as unfavorable to unions, made a considerable time prior to January 1st, 1942; comments made at a time when the complaining union admittedly had not even approached any of the

employees (R. 1339); comments made in respect of matters that filled the public press (the Gimbel Bros. strike [R. 1337]); comments that referred to happenings of "six or seven years ago" (R. 1337); comments that referred to another union (of photo finishing employees), with which this union was not even remotely connected (R. 1337-8).

All of this ante-dated by a considerable period the situation at the premises of petitioner 42nd St. Foto Shop, Inc., the employer of the discharged employees. Contra this, the second incident relied upon by the Board was the talk made by petitioner Sam Marcus, president of 42nd St. Foto Shop, Inc., to the employees of that corporation, in February of 1942. The discharges occurred between those dates.

The Board looked to the north, then to the south, and finding a vacuum, determined to fill it by the simple expedient of placing a muzzle on the employer, throttling any expression of opinion or of comment whatsoever. The courts below fell right in line, in direct derogation of petitioners' constitutional right.

Thus, the comment by the employer, which petitioners urge is privileged, falls into two time categories, before and after January 1st, 1942. These will be taken up *seriatim*.

The Board's summary of the comment prior to January 1st, 1942, is contained in its Final Decision (R. 1336-8). This is based entirely upon the testimony of one witness, the employee Irving. The Board's own statement discloses that this comment stemmed from two extraneous happenings—a strike at Gimbel's department store, located directly across the street from the 32nd Street store of petitioner Sam Marcus doing business as Fotoshop, and a strike conducted by another union against Marcus Photo Service (R. 1337-8). These incidents occurred months before January 1st, 1942.

The comment thus isolated by the Board was: "Unions seem to be created for the purpose of annoying employers" (R. 1337); a quotation of Mrs. Marcus, referring to the Gimbel strike, that she said "she made it a point of going into Gimbels every day just to walk through whether she bought anything or not, just to show the pickets" (idem); that "his (Marcus') employees could always come to him with their problems and there is no necessity of going to unions, and his employees don't believe in unions" (idem); and a remark attributed to Sam Marcus, referring to striking employees of another concern, members of another union, that such striking employees were "a bunch of ingrates who didn't know when they were well off and that it's unfortunate that they will have to lose their jobs because of being misguided by a racketeering union" (R. 1337-8).

Without specification, the Board attributed to others "* * * implications derogatory to unions" (R. 1337) and "* * * similar comments" (R. 1338).

The record places these remarks in an environment that alters quite substantially the animus and motivation that the Board sought to convey by quoting them in naked isolation. Objection was timely made to the introduction of testimony ante-dating January 1st, 1942 (R. 425-7, 432-3, 437-41).

In view of the outcome before the Board, it is well to set forth in full a statement of the Examiner, apropos of these objections:

> "Trial Examiner: In overruling counsel's objection, the Examiner will state that he is well aware that any expression of opinion by Mrs. Marcus as to a union not involved in this proceeding does not in and of itself express any anti-union opinions that she might have or might not have with the union involved in this proceeding" (R. 427).

Both the Examiner and the Board completely forgot this when they wrote their ultimate Findings.

Motions to strike out all of this testimony were also timely made, and denied (R. 764-5, 1182).

Concededly, this comment testified to by Irving as having been made by the employer was made long before Irving was employed by 42nd St. Foto Shop, Inc., the employer who allegedly improperly discharged him (R. 472), and long before the complaining union had become interested in organizing the petitioner's employees (R. 1339). Irving had not at that time even been approached to join the union (R. 577, 609). Nowhere in the record will there be found one scintilla of evidence to show that the complaining union was ever interested in any of the petitioners except 42nd St. Foto Shop, Inc.

Irving's testimony falls into three general categories: Comment referring to the Gimbel strike, comment referring to the photo finishing employees' union strike, and a miscellaneous category, that includes a somewhat remarkable situation.

The first category deals almost entirely with Mrs. Marcus, wife of petitioner Sam Marcus. The testimony was that Sam Marcus had practically nothing to do with the business located on 32nd Street (R. 391, 406) and that Mrs. Marcus was in charge there (R. 392).

Gimbel's department store is located directly across the street from the 32nd Street store (R. 413). Upwards of four hundred pickets were picketing that store on a picket line some six hundred feet long (R. 561). Apropos of that situation, Irving testified that Mrs. Marcus said this:

> The remark already quoted (*supra*, p. 13, R. 422); "Mrs. Marcus would make the remarks *to the customers* who came into the store about the unfortunate situation at Gimbels" (R. 423, empha-

sis supplied); "Well, I mean she was saying 'it's terrible, isn't it, that we have had trouble with unions before and we understand that these people are asking things way beyond them' " (R. 423).

He admitted that, when he said to Mrs. Marcus, apropos of her comment, "I know I wouldn't do that", that neither he, nor employees who had made the same response, was not criticized for that, saying "The subject was dropped. It was a conversation among a group of about eight or nine people and a number of people made comments in both directions" (R. 560). He did specifically admit that her remark " * * * was precipitated by the Gimbel strike, * * * " (R. 500).

He testified distinctly that prior to the Gimbel strike he had never heard Mrs. Marcus, nor any of the supervisory employees, "speak about unions" (R. 423), though in a typical volte face he later changed this testimony (R. 565-6, 570).

The strike of the members of the photo finishing employees' union occurred after the Gimbel strike (R. 572, 599) in September, 1941 (R. 604), and was accompanied with considerable noisy picketing (R. 562) and several picket lines (R. 608). That picketing ultimately was ended by court injunction (R. 608).

Here Irving's testimony was that both Sam Marcus and Mrs. Marcus had made comment. Be it noted again that this ante-dated any activity of the complaining union in respect of 42nd St. Foto Shop, Inc. (R. 425, 577, 609), was not concerned with the complaining union at all (R. 424-5, 575-6), and the comment specifically referred to the union then on strike (R. 572, 597, 610-1).

He testified that he heard a supervisory employee say "that those fellows (the striking photo finishing employees) * * * don't know what they are doing or what they're

letting themselves in for"; that he "heard Mrs. Marcus say that they were considering dropping the photo finishing business rather than give in to that union" (R. 428).

He attributed to Mr. Marcus the remark already quoted (*supra*, p. 13 [R. 429]). He admitted that upon his saying "I would rather not" to Mrs. Marcus' request to help out in the Marcus Photo Finishing Laboratory, he was neither pressed nor criticized (R. 428, 587-8).

He attributed to Mr. Marcus a further remark, concerning the striking photo finishing employees, "that they were allowing themselves to be led around by the nose by a union which is run by non-responsible people, and that they're cutting themselves away from their jobs in doing so because he would go out of business before he would give in to the union" (R. 602).

While there was some additional testimony proffered by Irving concerning alleged anti-union talk by another supervisory employee (R. 430, 431, 609-11), and he made also a tortuous effort to show anti-union bias with reference to an open letter signed by the employees and referring to the photo finishing strike (R. 431, 435, 619-20), what has hereinabove been cited contains both essence and detail of the alleged improper comment. He did admit specifically that the only union to which any of this comment could have had reference was the photo finishing employees' union (R. 610).

One further facet of this phase of the testimony remains, and this is, to put it mildly, remarkable. Irving admitted that when he applied to Sam Marcus for employment, he was "a complete stranger" to him (R. 676-7). He sought to establish a prior knowledge of him by Mrs. Marcus, on the basis that he had occasionally been a customer of the 32nd Street store (R. 677), although he admitted she did not know his name (R. 676).

Despite this, he testified that Mrs. Marcus immediately launched into a discussion of unionism with him, attribut-

ing to her the remark " * * * that a union was completely unnecessary * * *, that the employees don't feel any necessity for a union, * * * " (R. 662).

To Sam Marcus, at the very initial interview, when he was applying for a position, he attributed similar comment, almost in the very same words (R. 663, 677-8).

This witness was zealous, to say the least. How altogether incredible that an experienced employer would thus comment to a strange applicant for a position!

Supervisory employees testified in direct refutation of much of this testimony (testimony of Carr (R. 1345-8), and of Kaplan (R. 885-6, 891, 894-5, 897, 907-8, 910-11, 914-16, 937, 938-9, 948-9, 977).

On what basis the Board justified its selectivity in accepting Carr's testimony concerning the discharge of the employee Klass (R. 1347-8), and in disregarding both his and Kaplan's testimony concerning other alleged anti-union comment attributed to them, is unknown. For the purpose of this petition, however, petitioners rest upon this comment as testified to by the witness Irving.

Out of these remarks, totally devoid of even the suggestion, or a scintilla of coercion, restraint or interference, either actively exercised or potentially employed, the Board fashioned its conclusion that petitioners had violated the Act.

These incidents, and this is the record, complete, as to all of such prior to January 1st, 1942, the significant date in the complaint and the Examiner's Findings, all took place at a time well before, when not only the complaining union, but no union whatsoever, had become active in respect of the employees, and months before the alleged discriminatory discharges.

These incidents, further, took place in respect of an employer other than the employer 42nd St. Foto Shop, Inc., that had allegedly discharged Irving and Cohen for union activity, and on premises of other business entities.

Hard put to it to bolster this gap, the Board jumped to the second incident-in-chief, the talk by Sam Marcus, president of 42nd St. Foto Shop, Inc., to its employees on February 3rd, 1942. The Board summarized this in its Final Decision (R. 1348-9), but not completely. Here again baldness conceals, does not reveal. Admittedly, this incident is of more consequence to the point at issue at bar than the testimony already adverted to, hence it is necessary that far more than the selective extract utilized by the Board be shown, and thus the incident seen in its environment.

To accomplish that, some detailed reference to the testimony must be made. However, this should be noted,—this talk took place weeks *after* the alleged improper discharges.

These discharges constituted the core of the matter before the Board. With a fictitious sense of timing, the Board reached backward (that is, to the alleged anti-union bias ante-dating January 1st, 1942), and then forward (that is, to February 3rd, 1942), and because it found a discharge in between, blithely tinctured the discharge both with that which had occurred long before, and under totally unrelated circumstances, and with that which was yet to happen.

On February 2nd, 1942 the union had distributed a circular about the premises of 42nd St. Foto Shop, Inc. at 18 East 42nd Street (R. 299, 1348). This circular disparaged and vilified that one of the petitioners (R. 1192-3). It charged, among other things, that "we (the employees) are amongst the Lowest paid workers in the entire photographic industry"; that "the large turnover of workers * * * is an indication of insecurity and poor working conditions"; and that "we (the employees) cannot exist on the promises of our employer" (R. 1192). The circular further included a comparative schedule of salaries allegedly paid by petitioner and by a competitor under union con-

tract (R. 253-4) for the same type of work, purporting to show that employees of petitioner 42nd St. Foto Shop, Inc. were paid far less than were those of this competitor (R. 1193).

Petitioner 42nd St. Foto Shop, Inc. reacted immediately. Its president spoke to a goodly number of its employees on the very next day. What he allegedly then said was testified to by three witnesses called by the Board. As this is the crux of the instant proceeding, that testimony is here set forth in full. There is no other way to get this before this Court.

The first witness was one Rafalow (R. 255). By way of preface, attention is directed to an extraordinary situation concerning this witness. He testified through a direct examination (R. 255-61), at length under cross-examination (R. 261-92), again on an extended re-direct examination (R. 292-302), and was well into re-cross examination, when he emerged with the astounding statement, upon being compelled to admit to lack of truth telling, that "I am an atheist", and upon being asked "So that when you took that oath it did not mean a thing to you, did it?", calmly answered "No" (R. 303). Then followed pages of an agonizing effort by Board's counsel to refurbish the witness into some form of decency (R. 314, ff), prior to which he had claimed that he had "stated to the Trial Examiner that I was an atheist" (R. 304), which claim was completely refuted (R. 323).

On direct examination, Rafalow testified as follows:

> "Q. While you were employed at the 42nd Street Fotoshop did you attend a meeting of employees on a particular evening, about six o'clock? A. Yes, I attended a meeting of all the workers there.
>
> Q. About how many were there? A. 45, 50, something like that.

Q. Were they just the employees of the 42nd Street Fotoshop or were they the employees of the 32nd Street shop as well? A. Just the 42nd Street.

Q. And can you fix the date of that meeting? A. February 6th" (R. 256-7).

* * * * *

"Q. Now, what did Mr. Marcus say, as best you can remember? A. He said—he said that, 'Why join the union', he said, 'all of you received this leaflet (Pet. Ex. 9 [R. 1192-3]) which the union gave out last night, and it states here that the workers do not get paid according to the cost of standard of living has gone up, and other things like that'. He then stated that if the raise in pay became effective by the union agreement, then he will have to discharge a lot of younger people working in the place, because of inexperience, and that would mean that the older people will have to take more responsibilities because there isn't enough—because of inefficiency of the younger people, because they are not experienced. He then stated that, 'Why join a union on the outside? Why don't you organize among yourselves?' He called the union a bunch of racketeers and gangsters. Then he said "If you did join the union and you did get a raise, you really won't get a raise because the union will take it away by dues and assessments.' He kept repeating 'dues and assessments' throughout the speech.

Q. Can you remember anything else? A. No.

Q. Did he discuss his own financial condition with you? A. Oh, yes. He said that his accountant was right there and the accountant asked him and told him how he is making profit, he can't see how he is making profit and he also said that he is paying

ten per cent. more than he should pay to the workers.

Q. Did he speak at all of his competitors? A. Yes, he spoke of Abe Cohen's Exchange, Davega and Crawford, I think, was the other, and said that, 'They are under a union and you can't compare them to my store because they are million dollar firms and because of that the union—because of the union Abe Cohen's Exchange is now going out of business'" (R. 260-61).

On cross-examination his testimony was as follows:

"Q. And your statement now is that since February 9th you haven't talked about this case with anyone, is that right? A. The business agent of the union gave me a piece of paper which I signed on the evening of February 9th to refresh my memory.

Q. And you looked over that piece of paper? A. Yes.

Q. Before you got on the witness stand? A. Correct" (R. 271).

* * * * *

"Q. And where was this statement prepared? A. Prepared?

Q. Yes. A. In the union office.

Q. Did you dictate it? A. Yes.

Q. All of it? A. All of it.

Q. Word for word? A. Word for word.

Q. Nobody added anything to this statement or made any suggestions concerning it? A. No one.

Q. And to whom did you dictate it? A. To the union lawyer" (R. 274).

* * * * *

"Q. And every word in this statement, Board's Exhibit 8 for identification (R. 1189 ff.) was dictated by you? A. Yes" (R. 274).

* * * * *

"Q. And these words, I am quoting, 'a copy of said leaflet is hereto annexed',— A. Those weren't my words.

Q. Those were not your words? A. No, they weren't.

Q. So there is something in this statement that you didn't dictate, isn't there? A. Correct" (R. 274-5).

* * * * *

Q. So not everything in this statement was dictated by you, was it? A. No, it wasn't.

Q. So your statement to that effect before this is not true, is it? A. Correct.

Q. What is that? A. Correct.

Q. It is not true? A. That's right" (R. 275).

* * * * *

"Q. Now, I believe you testified on your direct examination that you heard Mr. Marcus call the union a bunch of gangsters and racketeers? A. Yes.

Q. And he was referring to Union Local 830? A. That's right.

Q. He mentioned that union by name when he said that they were a bunch of gangsters and racketeers? A. No, he didn't mention them by name.

Q. So, you just inferred he was talking about Local 830? A. Well, he was talking about the leaflet that 830 gave out so he most likely was talking about the union when he said racketeers and gangsters.

Q. Now, that was a pretty important statement to you, wasn't it? A. Yes.

Q. And it was fresh in your mind on February 9th? A. Correct.

Q. Did you include in this statement that you made on February 9th that Mr. Marcus called the union a bunch of gangsters and racketeers? A. Did I include it?

Q. Yes. A. Yes.

Q. It's in here? A. Yes.

Q. In what words is it in here? A. In English, I guess" (R. 289-90).

* * * * *

"Q. Now, in what words, Mr. Witness, is the statement that you just testified to as having been made by Mr. Marcus in this speech on February 6th, that the union is a bunch of gangsters and racketeers, phrased in this statement? A. 'Why give your money to a bunch of racketeers and gangsters? You could have your own union in here.'

Q. Now, that word 'gangsters' made a tremendous impression on you, didn't it? A. Yes.

Q. And you resented it? A. Certainly.

Q. Now, you show me where the word 'gangsters' appears in this statement. (Hands document to witness.) A. It doesn't appear here.

Q. So it wasn't said by Mr. Marcus, was it, on February 6th? A. It was.

Q. You remember on May 6th, 1942 that he used the word 'gangsters' three months to the day of the meeting, but on February 9th, three days after the meeting you didn't remember it? A. I did remember it.

Q. But you didn't put it in? A. No" (R. 291-2).

He was not specifically questioned concerning this phase of the matter on re-direct examination, but was again on re-cross examination:

"Q. So you, in answering my question concerning the authorship of this Board's Exhibit 8 for identification, withheld a part of the truthful answer, didn't you? A. Yes.

Q. Knowing that you were withholding part of the truth? A. That's correct.

Q. And knowing that you were required to state the whole truth? A. That's correct" (R. 305).

The next witness called by the Board in this connection was one Hertzel, who had signed an application for union membership (R. 341) and was an employee of petitioner 42nd St. Foto Shop, Inc. (R. 328), at the time he testified.

Here again a prefatory comment is required. Hertzel stated that he had heard the manager of 42nd St. Foto Shop, Inc. make a remark that he construed as being hostile to the Union (R. 328-9). He admitted that the remark allegedly made by the manager definitely did not refer to the union involved (R. 354, 366).

The significant aspect of this incident lies in Hertzel's testimony that the manager allegedly made this remark to two salesmen whom Hertzel knew well, but whose identities or names he said he could "not remember". This fantastic attitude of his is spread out over many pages of the record (R. 328-30, 343-55, 1047-9) and serves to illustrate his venom. Hence his admissions are significant (*infra*, p. 27).

On direct examination:

"Q. On what occasion did Mr. Marcus make the speech to which you have referred? A. After the union leaflet was sent out.

Q. Are you referring to Board's Exhibit 9? A. Yes, that's the leaflet.

Q. And how long after the sending of Board's Exhibit 9 (R. 1192 ff.) did Mr. Marcus make this speech? A. The day after the leaflet was sent out.

Q. And before whom did he make the speech? A. Before the employees of Fotoshop.

Q. Where was the meeting held? A. On the third floor.

Q. At what time of day? A. Six o'clock at night" (R. 352).

* * * * *

"Q. Who spoke at that meeting? A. Mr. Marcus.

Q. Alone or did anyone else join the talk? A. No, just he alone.

Q. What did Mr. Marcus say? A. Well, he approached the speech by holding up the leaflet and saying, 'I suppose all of you received one of these yesterday'; and he based his whole speech upon different paragraphs of the leaflet.

Q. Just tell us what he said. A. Well——

Q. As near as you can. A. The main thoughts of the speech were that, 'Why join an outside union when you can join a union amongst yourselves and there wouldn't be as much racketeering attached to the union amongst yourselves as there would be outside.' And he looked at the wage schedule comparing our wages with the wages of other stores and said they weren't true.

Q. Did he mention any other stores by name? A. Yes. He mentioned Abe Cohen's and Crawford's and other outfits that he said were million dollar outfits and they couldn't be compared with Fotoshop; but he was very flattered that they did mention him in the same phrase as those places" (R. 333-4).

* * * * *

"Q. Who was the girl who spoke out? A. Her name was Lenore. (There is no testimony of any 'reprisal' against this girl.)

Q. What did she say? A. She said, 'Mr. Marcus, don't you think that since the cost of living has gone

so much higher that we deserve a raise?' She said, 'My mother can't afford to pay off her expenses on the salary that I am getting', and that she is the main support of her family.

Q. Did she state what her salary was. A. No. I don't believe she did.

Q. Did Mr. Marcus reply to her statement? A. Yes.

Q. What did he say? A. He said that well, his expenses had gone up also and that he has to pay more for his goods and therefore he couldn't very well raise his salaries and that he is paying ten per cent. more to his employees now than he is supposed to. He said that his accountant is right there and he can verify it.

Q. Can you recall anything else that was said by Mr. Marcus at that meeting? A. Oh, yes. As to the salaries he said that he doesn't pay anyone of his salesmen less than $30 a week and I don't remember—I think he went down the line and compared the other salaries too and disputed those salaries against what he pays.

Q. Did he say anything else with reference to either Local 830 or any other outside union? A. Well, he said that—when he said to form a company union, well, he didn't use those words. He said, 'Why not form a union amongst yourselves? The other union is—they are racketeers and they are reigned by racketeers and why—that even if you do get a larger salary most of your salary will go out into dues and assessments.'

Q. Can you think of anything else he said? A. No, I can't" (R. 334-5).

* * * * *

"Q. Do you recall anything else in that connection? A. He also said that if he was to sign a con-

tract, a union contract, he'd have to fire the inexperienced employees that are now gaining experience even though they are getting small salaries and just keep the old employees who will have to become doubly efficient.

Q. Did he make any reference to strikes, any reference whatsoever? A. Not that I recall" (R. 336).

On cross-examination:

"Q. You didn't read this document, Board's Exhibit 8 for Identification (R. 1189 ff.) at all, before you signed it, did you? A. No, I didn't" (R. 337).

• • • • •

"Q. Did you take any notes while Mr. Marcus was talking that evening? A. No" (R. 343).

• • • • •

"Q. Did you hear Mr. Marcus characterize Local 830 as a bunch of gangsters? A. Not 830 in particular.

Q. Did you hear Mr. Marcus characterize Local 830 as a bunch of racketeers? A. No.

Q. The talk that he gave that night was devoted mainly to specific answers of the allegations or statements made in this Board's Exhibit 9, wasn't it? A. This one?"

• • • • •

"Q. He referred to the paragraphs here by number and answered those? A. That's right.

Q. And then he took up this statement here about comparison salaries and he answered those; is that right? A. That's right.

Q. And that was what he talked about? A. That's right" (R. 361).

• • • • •

"Q. And do you say also that when Mr. Marcus said here, quoting you—I am reading now from Board's Exhibit 8 for Identification: 'He then falsely said, "I never pay a camera salesman less than $30 a week" ', do you know that that statement is false?"

* * * * *

"A. No, I couldn't say about a camera salesman" (R. 362).

* * * * *

"Q. So this statement isn't true, is it?"

* * * * *

"A. No" (R. 364).

It should be noted that this witness specifically denied that Marcus characterized the union as gangsters or racketeers (*supra*, p. 27).

The third witness was one Bordin, who testified as follows on direct examination:

"Q. Did you ever attend a meeting of employees at the 42nd St. Foto Shop? A. Yes, I did.

Q. On what day? A. I believe that was on February 2nd" (R. 701).

* * * * *

"Q. Who was talking when you came up to the meeting? A. Mr. Marcus.

Q. What did he say? A. I don't recollect too well.

Q. As best as you can remember, the substance of what you remember his having said. A. He did mention about he didn't mind us organizing."

* * * * *

"A. He didn't mind us organizing by ourselves but he didn't care to have or see an outside union

taking advantage of us; and the raises in salary would go toward dues and assessments; and if we didn't like the job we should quit and 'not knife him in the back'.

Q. Do you remember anything else? A. Very vague.

Q. Do you want to think some more about it or have you given us your best recollection? A. Maybe I will think of some more things as I go along. I did make a statement at that time in writing.

Q. At what time? A. Right after that meeting.

Q. How long after that meeting? A. Oh, a day or two" (R. 705-6).

Despite the witness' claim that he had made a written statement after the meeting, which he delivered to the union organizer (R. 706-7), no such statement was ever produced. This witness said absolutely nothing about "gangsters" or "racketeers".

At the risk of the length involved, it has been felt necessary to set forth in this detail this comment for the Board's summary (R. 1348-9) is neither accurate nor complete. This does not require that this Court pass upon the factual Findings made by the Board. Presumably, the affirmance by the courts of the State of New York, in view of the provision of the Act, places those Findings as such, outside the scope of review here (cf. *Matter of Stork Restaurant, Inc.* v. *Boland, loc. cit. supra*, p. 5).

As will be shown by the discussion in the supporting brief, petitioners' position is that all of the comment testified to as having been made before January 1st, 1942, apart from its fatal deficiency of incompetence under the Board's complaint, is wholly privileged as protected right of speech, comment and opinion.

Further, do petitioners urge, that the comment on February 3rd, 1942 was a protected and privileged response

to the vilifying attack made by the union against the employer. The decision of the courts below, apropos of this, must be reversed in order to afford to petitioners the equal protection of the laws.

Specification of Errors to Be Urged.

The Court of Appeals of the State of New York erred:

1. In failing to hold that an employer has the same freedom and right, no more but no less, to comment and express opinion concerning a union that has disparaged and vilified it, as it grants to such union in respect of such employer, thus denying to the employer the equal protection of the laws.

2. In failing to hold that utterances by an employer to its employees, which contain no threats, actual nor implied, but at most are merely expressions of preference against unionization, are privileged and protected as free speech as a matter of law.

3. In holding, in effect by affirmance, that a general Board finding of coercion, restraint and interference, in the absence of evidence of such apart from the remarks of the employer that are privileged as free speech, is supported by evidence.

4. In holding, in effect by affirmance, that what is constitutionally protected free speech constitutes merely a question of fact for the Board, whose determination thereof is not subject to judicial review.

5. In failing to vacate and set aside the Decision and Order of the Board.

Reasons for Granting the Writ.

1. The courts of the State of New York have decided Federal questions of substance not theretofore determined by this Court.

This Court has several times considered and defined the obligations, rights, privileges and immunities of employers in respect of the provisions of the National Labor Relations Act (29 U. S. C. §151 *et seq.*), but never their obligations, rights, privileges and immunities in respect of a labor relations act of a state, and particularly of the State of New York.

This case then is one of first impression, involving the construction, application and interpretation of the duties of an employer, pursuant to the provisions of the New York State Labor Relations Act, when viewed in the light of the First and Fourteenth Amendments (based upon the rights of free speech and equal protection of the laws). Similarly is this one of first impression involving construction, application and interpretation of the duties of an employer pursuant to the provisions of any state labor relations act, when viewed in the light of the First and Fourteenth Amendments.

2. The courts of the State of New York have decided Federal questions of substance in a way probably not in accord with applicable decisions of this Court.

The provisions of the New York State Labor Relations Act are almost verbatim those of the National Labor Relations Act. The courts of the State of New York have held that the decisions of the Federal courts construing the National Labor Relations Act are to be given great weight in interpretation of the State Act (*New York State Labor Relations Board* v. *Timen*, 264 App. Div. 120, at p. 122; see also Matter of *Davega-City Radio, Inc.* v. *State Labor Relations Board*, 281 N. Y. 13, 22).

The result reached by the courts of the State of New York is not in accord with that announced by the United States Circuit Court of Appeals, Second Circuit, in *American Tube Bending Co.* v. *National Labor Relations Board*, 134 Fed. 2d 993, cert. den. 320 U. S. 768.

This Court has repeatedly held that the protection afforded by the First Amendment is not diminished by the requirements of the National Labor Relations Act (see authorities cited in supporting brief.

The similarity, indeed almost identity, of the provisions of the New York and the National Acts, plus the rule pronounced by the New York courts (*Matter of Timen*, and *Davega-City Radio, Inc.* v. *Boland*, p. 31, *supra*) and the controlling effect of the Federal Constitution afford no basis for distinction in the application of such holdings by this Court, merely because a state act is involved. Consequently, the protection afforded by the First Amendment is, under the decisions of the courts of the State of New York, equally effective, despite the requirements of the State Act.

3. This case is one of vast public interest and importance. Without a decision by this Court, petitioners, as well as all other employers in the State of New York, and in other states having similar labor relations acts, cannot know the limits of their rights under the First Amendment, nor what communications or utterances they may address to their employees.

Further, if the holdings of the New York State courts be permitted to stand, without some clarification, neither petitioners nor other employers in the State of New York, and in other states having similar labor relations acts, may, with any safety, defend themselves against vilification and other attack by unions.

4. The holding of the State courts of New York, in effect, denies to petitioners the equal protection of the

laws. Apparently a union, short of committing a criminal libel, may say what it pleases concerning an employer, but the employer is sharply and narrowly restricted in his defense or counter to such attack. The failure of the courts of the State of New York to set forth any delimitation of the rights of an employer in this respect, has clouded the protective scope of the provisions of the Fourteenth Amendment.

The decision of this Court is necessary that employers in the State of New York, and in other states having similar labor relations acts, may know what constitutes a proper communication to their employees, what subject matter may form the content of such communications, and to what extent employers may discuss with their employees matters relating to the labor relations between them.

The Federal courts have held that expressions of preference, or indeed of hostility to unions, unaccompanied by interference, restraint or coercion, are not in violation of the provisions of the National Labor Relations Act. The effect of the holding by the courts of the State of New York is that such expressions under such circumstances are in violation of the State Act, which is worded almost precisely the same as is the National Act.

Under the circumstances here presented, of a union not certified by the Board, not having made any demands upon the employer, not claiming even to represent a majority of the employees, and with no election or other proceeding pending, the silent holding of the courts of the State of New York leaves employers in that State completely in the dark concerning what they may or may not say to their employees concerning unions, and what they may or may not say to their employees in defense against attack made against them.

CONCLUSION.

The holdings below with respect to what conduct by an employer constitutes restraint and coercion of employees and interference with employees' right of self-organization, depart from principles laid down by this Court and by the Circuit Court of Appeals, Second Circuit. A question of public importance concerning enforcement of the New York State Labor Relations Act, when viewed in the light of the constitutional guarantees of free speech and equal protection of the laws, is raised.

For these reasons it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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April, 1945.